STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARRISON CORPORATION, INC., d/b/a SMOKE & SNUFF, MACKOUL DISTRIBUTORS, INC., and ELAINE TOLAR,	)	
Petitioners,	)	
	)	CASE NO. 93-4846RP
vs.	)	
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,	)	
Respondent,	)	
and	)	
AMERICAN CANCER SOCIETY, FLORIDA DIVISION, INC., and AMERICAN LUNG ASSOCIATION OF FLORIDA, INC.,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William F. Quattlebaum, held a formal hearing in the above-styled case on September 27, 1993, in Tallahassee, Florida.

APPEARANCES

For Petitioners:	John French, Esquire Robert S. Cohen, Esquire Post Office Box 10095 Tallahassee, Florida 32302
For Respondent:	William A. Frieder, Esquire Suite 200 J, Building I 1321 Winewood Boulevard Tallahassee, Florida 32399-0700
For Intervenor American Cancer Society:	Eric B. Tilton, Esquire 2120 Killearney Way, Suite 200 Tallahassee, Florida 32308
For Intervenor American Lung Association:	Patrick J. Phelan, Jr., Esquire Post Office Box 669 318 North Monroe Street Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

Whether proposed rules 10D-105.009, 10D-105.011 and 10D-105.012, Florida Administrative Code, related to the Florida Indoor Clean Air Act constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On July 30, 1993, the Florida Department of Health and Rehabilitative Services (DHRS) published proposed rules related to the Florida Indoor Clean Air Act. The Petitioners timely filed petitions challenging the validity of the proposed rules.

Petitions to Intervene were filed by the American Cancer Society and the American Lung Association. On October 1, 1993, the DHRS published notice in the Florida Administrative Weekly of revision of the proposed rules.

Prior to the hearing, Petitioner Elaine Tolar withdrew her challenge to the rules. At the hearing, Petitioner Garrison Corporation, Inc., (Garrison) presented the testimony of one witness and had exhibits numbered 1 and 3-6 admitted into evidence. Petitioner MacKoul Distributors presented no witnesses or evidence. Respondent DHRS presented the testimony of one witness and had exhibits 2-4 admitted into evidence. The intervenors presented no witnesses or evidence.

The transcript was filed on October 11, 1993. Proposed final orders were filed, by agreement of the parties, on October 29, 1993. The proposed orders were carefully considered in the preparation of this Final Order. The proposed findings of fact are ruled upon in the Appendix which is attached and hereby made a part of this Final Order.

FINDINGS OF FACT

1. Garrison Corporation, Inc., (Garrison) operates a chain of retail tobacco outlets, doing business as "Smoke & Snuff" stores in 16 Florida mall locations. In addition to tobacco products, Garrison sells tobacco-related accessories and various gift items. Garrison is a family-owned business in existence since November of 1973.

2. As a retail store primarily in the business of selling tobacco or tobacco related products, the Garrison stores are exempt from the smoking restrictions set forth in the Florida Clean Indoor Air Act (Act). Customers of the Garrison stores can smoke within Smoke & Snuff stores without restriction.

3. At least two of the malls in which Garrison stores operate have advised that smoking will be prohibited within mall common areas. Some mall operators have implemented smoking prohibitions on their own unrelated to requirements of the Act.

4. Garrison asserts that the imposition of mall smoking restrictions results in a decrease in customer traffic in the mall and declining sales for the tobacco retailer. The chief operating officer for Garrison testified at hearing that the imposition of tobacco smoking restrictions in Florida malls has caused and will continue to result in a diminution in business for the Smoke & Snuff stores.

5. In support of its position, Garrison offered unaudited sales and income figures for the Smoke & Snuff stores. A review of the sales figures indicates that sales in many Smoke & Snuff stores have declined in past years. The decline in Garrison sales has not been limited merely to tobacco products, but has impacted non-tobacco merchandise lines sold in the Smoke & Snuff stores as well.

6. Over the past five years, smoking by adults has decreased in the United States. As smoking has declined, the adult customer base for tobacco products has been reduced. Further, other factors such as store personnel, weather and economic conditions can affect retail sales.

7. There are no studies on the extent of sales impact, if any, caused by the imposition of tobacco smoking restrictions in malls. There are no studies which indicate that the imposition of smoking restrictions in malls results in a decline in customer traffic.

8. The evidence fails to establish that customer traffic declines as a result of the imposition of smoking restrictions. The evidence fails to establish that the Garrison sales decline is directly or primarily related to the imposition of smoking restrictions in the malls where the Smoke & Snuff stores are located. The evidence fails to establish that Petitioner Garrison has standing to challenge the proposed rules.

9. As to MacKoul Distributors, the prehearing stipulation states that MacKoul Distributors operates a place of employment and as such is subject to the Act and the proposed rules.

10. Part II of Chapter 386, Florida Statutes, is the Florida Clean Indoor Air Act (Act). As stated at section 386.202, Florida Statutes, the purpose of the Florida Clean Indoor Air Act is as follows:

> ...to protect the public health, comfort, and environment by creating areas in public places and at public meetings that are reasonably free from tobacco smoke by providing a uniform statewide maximum code. The Act does not require the designation of smoking areas....

11. The Act provides at Section 386.204, Florida Statutes, as follows:

> A person may not smoke in a public place or at a public meeting except in designated smoking areas. These prohibitions do not apply in cases in which an entire room or hall is used for a private function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the room or hall.

12. Section 386.203, Florida Statutes, provides definitions as follows:

> (1) "Public place" means the following enclosed, indoor areas used by the general public:

(a) Government buildings;
(b) Public means of mass transportation and their associated terminals not subject to federal smoking regulation;
(c) Elevators;
(d) Hospitals;
(e) Nursing homes;
(f) Educational facilities;
(g) Public school buses;
(h) Libraries;
(i) Courtrooms;
(j) Jury waiting and deliberation rooms;
(k) Museums;
(l) Theaters;
(m) Auditoriums;
(n) Arenas;
(o) Recreational facilities;
(p) Restaurants which seat more than 50 persons;
(q) Retail stores, except a retail store the primary business of which is the sale of tobacco or tobacco related products;
(r) Grocery stores;
(s) Places of employment;
(t) Health care facilities;
(u) Day care centers; and
(v) Common areas of retirement homes and condominiums.

* * *

(4) "Smoking" means possession of a lighted cigarette, lighted cigar, lighted pipe, or any other lighted tobacco product.

(5) "Smoking area" means any designated area meeting the requirements of ss. 386.205 and 386.206.

(6) "Common area" means any hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, entryway, or conference room in any public place.

13. The Act provides no definition of "retail store" or "place of employment." The Act does not specifically include "malls" within the definition of "public places."

14. Section 386.205, Florida Statutes, addresses the matter of designation of smoking areas, and provides as follows:

(1) Smoking areas may be designated by the person in charge of a public place. If a smoking area is designated, existing physical barriers and ventilation systems shall be used to minimize smoke in adjacent nonsmoking areas. This provision shall not be construed to require fixed structural or other physical modifications in providing these areas or to require operation of any existing heating, ventilating, and air conditioning system

(HVAC system) in any manner which decreases its energy efficiency or increases its electrical demand, or both, nor shall this provision be construed to require installation of new or additional HVAC systems..

(2)(a) A smoking area may not be designated in...any common area as defined in s 386.203....

* * *

(3) In a workplace where there are smokers and nonsmokers, employers shall develop, implement, and post a policy regarding designation of smoking and nonsmoking areas. Such a policy shall take into consideration the proportion of smokers and nonsmokers. Employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. An entire area may be designated as a smoking area if all workers routinely assigned to work in that area at the same time agree. With respect to the square footage in any public place as described in subsection (4), this square footage shall not include private office work space which is not a common area as defined in s. 386.203(6) and which is ordinarily inaccessible to the public.

(4) No more than one-half of the total square footage in any public place within a single enclosed indoor area used for a common purpose shall be reserved and designated as a smoking area. This square footage limitation does not apply to restaurants as defined in s. 386.203(1)(p). However, such a restaurant must ensure that no more than 65 percent of the seats existing in its dining room at any time are located in an area designated as a smoking area.

(5) A smoking area may not contain common areas which are expected to be used by the public.

15. Section 386.206, Florida Statutes, provides as follows:

The person in charge of a public place shall conspicuously post, or cause to be posted, in any area designated as a smoking area signs stating that smoking is permitted in such area. Each sign posted pursuant to this section shall have letters of reasonable size which can be easily read. The color, design, and precise place of posting such signs shall be left to the discretion of the person in charge of the premises. In order to increase public awareness, the person in charge of a

public place may, at his discretion, also post "NO SMOKING" or "NO SMOKING EXCEPT IN DESIGNATED AREAS" signs as appropriate.

16. Section 386.207, Florida Statutes, addresses the administration and enforcement of the provisions of the Act and provides as follows:

> (1) The department or division shall enforce ss. 386.205 and 386.206 and to implement such enforcement shall adopt...rules specifying procedures to be followed by enforcement personnel in investigating complaints and notifying alleged violators, rules defining types of cases for which exemptions may be granted, and rules specifying procedures by which appeals may be taken by aggrieved parties.
>
> (2) Public agencies responsible for the management and maintenance of government buildings shall report observed violations to the department or the division. The State Fire Marshal shall report to the department or division observed violations of ss. 386.205 and 386.206 found during its periodic inspections conducted pursuant to its regulatory authority. The department or division, upon notification of observed violations of ss. 386.205 and 386.206 , shall issue to the proprietor or other person in charge of such public place a notice to comply with ss. 386.205 and 386.206. If such person fails to comply within 30 days after receipt of such notice, the department or division shall assess a civil penalty against him not to exceed $100 for the first violation and not to exceed $500 for each subsequent violation. The imposition of such fine shall be in accordance with the provisions of chapter 120. If a person refuses to comply with ss. 386.205 and 386.206, after having been assessed such penalty, the department or division may file a complaint in the circuit court of the county in which such public place is located to require compliance.
>
> (3) A person may request an exemption from ss. 386.205 and 386.206 by applying to the department or division. The department or division may grant exemptions on a case-by-case basis where it determines that substantial good faith efforts have been made to comply or that emergency or extraordinary circumstances exist.

17. Section 386.208, Florida Statutes, provides as follows:

> Any person who violates s. 386.204 commits a noncriminal violation as provided for in s. 775.08(3), punishable by a fine of not more than $100 for the first violation and not more than $500 for each subsequent violation. Jurisdiction shall be within the appropriate county court.

18. This case involves the Petitioners' challenge to proposed rules 10D-105.009(1), (2), (3), (4), (8), (10) and (11), proposed rule 10D-105.011, and proposed rule 10D-105.012(2).

19. In relevant part, proposed rule 10D-105.009 provides as follows:

> 10D-105.009 - On-Site Investigations of Public Places --
> During inspections or investigations of any Clean Indoor Air Act complaint, HRS personnel shall document all observed violations of Florida Statutes sections 386.205 or 386.206. Such violations include the following:
> (1) In any workplace where there are smokers and nonsmokers, employers shall develop a policy with regard to the designation of smoking areas. Should there be no written policy, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to develop a smoking policy regarding smoking and nonsmoking areas."
> (2) Employers are required to implement a written smoking policy. If employees are observed violating a workplace smoking policy, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to implement an existing smoking policy."
> (3) Should a smoking policy exist for a workplace but not be posted, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to post a smoking policy."
> (4) When a common work area is designated as a smoking area, all workers assigned to work within that single enclosed area must agree to such a designation. (Partitioned work spaces and rooms not separated by closed doors, floor to ceiling moveable walls or similar floor to ceiling barrier do not constitute separate work areas.) This violation of the Florida Clean Indoor Air Act will be documented as:
> (a) failure to post signs in a designated smoking area, a violation of section 386.206, F.S., and

(b) failure to implement a smoking policy regarding smoking and nonsmoking areas, a violation of section 386.205(3), F.S.

* * *

(8) If single occupancy offices have not been counted in the calculation of the square footage of a designated smoking area where both smokers and nonsmokers routinely assigned to work at the same time and the doors of those offices are left open, then a violation of section 386.205(3), exists and will be documented as "Square footage calculation for designation of smoking areas is incorrect."

* * *

(10) If smoking is allowed anywhere in an enclosed shopping mall concourse, then a violation of section 386.205, F.S., exists and shall be documented as :"Smoking permitted or designated in a prohibited area."

(11) If smoking is allowed in an enclosed shopping mall food court and is not specifically regulated by the Department of Business and Professional Regulation, then a violation of section 386.205, F.S., exists and shall be documented as "Smoking permitted or designated in a prohibited area."

20. In relevant part, proposed rule 10D-105.011 provides as follows:

10D-105.011 - Types of Cases for which Exemptions may be Granted; Procedures by which Appeals may be taken by Aggrieved Parties. --

(1) The proprietor or other person in charge of a public place may request an exemption from Florida Statutes sections 386.205 or 386.206, by submitting their request in writing to the HRS State Health Officer. On the recommendation of the State Health Officer, the department may grant any exemptions from the requirements of section 386.205(4) or 386.206, F.S., as an emergency or extraordinary circumstances which justifies exemption when compliance with the Florida Clean Indoor Air Act would result in a greater hazard to public health than would result from granting an exemption. Temporary exemptions of limited duration may be granted under emergency or extraordinary conditions when good-faith efforts to comply have been made.

(2) Public places which have received a letter of complaint as described by Florida Statutes section 386.207(2), and intend to request exemption from the requirements of the law, must file such a request with the

State Health Officer within 30 days of receipt of the notice of the alleged violation.

(3) Proprietors or persons in charge of public places who have been assessed penalties under Florida Statutes sections 386.205 or 386.206, may seek administrative review of the assessment pursuant to the provisions of Florida Statutes Chapter 120.

21. In relevant part, proposed rule 10D-105.012 provides as follows:

10D-105.012 - Minimum Standards for Assessing Fines by HRS Personnel Against Public Places Found to be in Violation of the Florida Indoor Clean Indoor Air Act.

(1) When the proprietor or other person in charge of a public place has been notified of observed violations and has failed to correct those violations, the department shall assess fines in accordance with the provisions of Chapter 120, Florida Statutes....

(The subsection includes a list of violations with increasing fines depending on whether the violation is a first, second or third offense.)

* * *

(2) For every offense after the third offense, the maximum penalty of $500.00 shall be assessed. Each day that a violation continues shall constitute a separate violation. Separate fines shall be assessed for each observed violation, and for each day that each violation persists.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.54, Florida Statutes.

23. As set forth in the Findings of Fact, Petitioner Garrison has failed to establish that the alleged customer traffic and sales decline is directly or proximately the result of the imposition of smoking restrictions in the malls where the Smoke & Snuff stores are located. The evidence fails to establish that Petitioner Garrison has standing to challenge the proposed rules.

24. As to Petitioner MacKoul Distributors, the prehearing stipulation entered into by the parties states that MacKoul Distributors operates a place of employment and as such is subject to the Act and the proposed rules. Accordingly, Petitioner MacKoul Distributors has standing to challenge the proposed rules.

25. As stated at section 120.52(8), Florida Statutes, a proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
> (e) The rule is arbitrary or capricious.

26. The burden of proof falls to the Petitioners to establish that the rule is an invalid exercise of delegated legislative authority.

27. As noted in the Petitioner's proposed order, a proposed rule which does not exceed an agency's statutory authority and which is reasonably related to the appropriate purpose of the statute should be sustained. Marine Fisheries Commission v. Organized Fishermen of Florida, 503 So.2d 935 (Fla 1st DCA 1987); Agrico Chemical Co. v DER, 365 So.2d 759 (Fla 1st DCA 1978). The agency's interpretation of a statute need not be the sole possible interpretation, but need only be within the range of possible interpretations. Humhosco, Inc. v. DHRS, 486 So.2d 258 (Fla. 1st DCA 1985); DPR v. Durrani 455 So.2d 515 (Fla 1st DCA 1984). In determining whether an agency has enlarged upon its statutory authority, the court may look at the entire statutory framework as well as the specific provision cited as statutory authority. Cataract Surgery Center v. HCCCB, 581 So.2d 1359 (Fla. 1st DCA 1991); United Shoe Corp. v. DPR, 578 So.2d 376 (Fla. 1st DCA 1991).

28. There is no evidence that the DHRS has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54.

Proposed rule 10D-105.009(1)-(3)

29. Proposed rule 10D-105.009(1)-(3) establishes violations for the failure to develop or implement a smoking policy and for the failure to post notice of the policy. The Petitioners assert that the proposed rule cited contravenes the provisions of Section 386.205(3), Florida Statutes, which states that employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. Review of the cited proposed rule fails to support the assertion.

30. Section 386.205(3), Florida Statutes, requires employers to develop, implement, and post a smoking area designation policy in a workplace where there are smokers and nonsmokers.

31. Proposed rule 10D-105.009 in part provides as follows;

> (1) In any workplace where there are smokers and nonsmokers, employers shall develop a policy with regard to the designation of smoking areas. Should there be no written policy, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to develop a smoking policy regarding smoking and nonsmoking areas."
> (2) Employers are required to implement a written smoking policy. If employees are observed violating a workplace smoking policy, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to implement an existing smoking policy."
> (3) Should a smoking policy exist for a workplace but not be posted, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to post a smoking policy."

32. The rules provide nothing more than the procedure to be followed by enforcement personnel in investigating complaints and notifying alleged violators. The DHRS clearly has the authority to adopt such rules.

33. An employer affected by the cited provisions is obligated to adopt a smoking area designation policy. Subsection (1) of the cited rule provides that where there has been a failure to do so, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to develop a smoking policy regarding smoking and nonsmoking areas." If an employer has adopted such a policy, it is not possible for the DHRS to deem that a violation has occurred.

34. An employer affected by the cited provisions is obligated to implement a smoking area designation policy. Subsection (2) of the cited rule provides that where employees are observed violating a workplace smoking policy, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to implement an existing smoking policy." If an employer has implemented such a policy, it is not possible to deem that a violation has occurred.

35. An employer affected by the cited provisions is obligated to post a smoking area designation policy. Subsection (3) of the cited rule provides that where a smoking policy exists for a workplace but is not posted, a violation of section 386.205(3), F.S. exists and will be documented as "Failure to post a smoking policy." If an employer has posted such a policy, it is not possible to deem that a violation has occurred.

Proposed rule 10D-105.009(4)

36. The Petitioners assert that proposed rule 10D-105.009(4) establishes violations for failure to receive approval of all workers in a common area before designating the area for smoking which are identified as a failure to implement a smoking policy regarding smoking and nonsmoking areas (violation of section 386.205(3)) and a failure to post signs in a designated smoking area (violation of section 386.206).

37. Section 386.205 in part provides as follows:

> (3) In a workplace where there are smokers and nonsmokers, employers shall develop, implement, and post a policy regarding designation of smoking and nonsmoking areas. Such a policy shall take into consideration the proportion of smokers and nonsmokers. Employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. An entire area may be designated as a smoking area if all workers routinely assigned to work in that area at the same time agree....

38. The cited rule provides as follows:

> (4) When a common work area is designated as a smoking area, all workers assigned to work within that single enclosed area must agree to such a designation. (Partitioned work spaces and rooms not separated by closed doors, floor to ceiling moveable walls or similar floor to ceiling barrier do not constitute separate work areas.) This violation of the Florida Clean Indoor Air Act will be documented as:
> (a) failure to post signs in a designated smoking area, a violation of section 386.206, F.S., and
> (b) failure to implement a smoking policy regarding smoking and nonsmoking areas, a violation of section 386.205(3), F.S.

39. The citation to statutory violations is unrelated to the alleged offense. The failure to obtain approval of all workers in a common area before designating the area for smoking does not constitute a failure to implement a smoking policy or a failure post signs in a designated smoking area. Such classification of the violation is illogical and is arbitrary. Proposed rule 10D-105.009(4) is an invalid exercise of delegated legislative authority.

40. It should be noted that the failure to obtain approval of all workers in a common area before designating the area for smoking constitutes a violation of Section 386.205 and is addressed by proposed rule 10D-105.009(5).

Proposed rule 10D-105.009(8)

41. The Petitioners assert that proposed rule 10D-105.009(8) establishes a violation for an incorrect square footage calculation for designation of smoking areas if single-occupancy offices have not been included in the calculation and if the doors of such offices remain open.

42. Section 386.205 in part provides as follows:

> (3) In a workplace where there are smokers and nonsmokers, employers shall develop, implement, and post a policy regarding designation of smoking and nonsmoking areas. Such a policy shall take into consideration the proportion of smokers and nonsmokers. Employers who make reasonable efforts to develop, implement, and post such a policy shall be deemed in compliance. An entire area may be designated as a smoking area if all workers routinely assigned to work in that area at the same time agree. With respect to the square footage in any public place as described in subsection (4), this square footage shall not include private office work space which is not a common area as defined in s. 386.203(6) and which is ordinarily inaccessible to the public.
> (4) No more than one-half of the total square footage in any public place within a single enclosed indoor area used for a common purpose shall be reserved and designated as a smoking area. This square footage limitation does not apply to restaurants as defined in s. 386.203(1)(p)....

43. The cited rule provides as follows:

> (8) If single occupancy offices have not been counted in the calculation of the square footage of a designated smoking area where both smokers and nonsmokers routinely (sic) assigned to work at the same time and the doors of those offices are left open, then a violation of section 386.205(3), exists and will be documented as "Square footage calculation for designation of smoking areas is incorrect."

44. The rule appears to require that either that the doors of private office spaces which are not designated as smoking areas be closed or that such doors remain open and be included in the square footage count. Apparent failure to do so will constitute an incorrect square footage calculation for purposes of designating a smoking area. The implemented statute provides only that the square footage calculation not include private office work space which is not a common area as defined in s. 386.203(6) and which is ordinarily inaccessible to the public. The rule enlarges the specific provisions of law implemented and as such is an invalid exercise of delegated legislative authority.

Proposed rule 10D-109.009(10)

45. The Petitioners assert that the cited rules establish violations for smoking in a mall concourse and that such is outside the authority of the Act. The Petitioners assert that malls are not within the definition of "public places" for purposes of the Act because malls are not retail stores, that mall

concourses do not constitute the entryways to interior retail stores, and that the Legislature considered and rejected inclusion of malls within the Acts definition of "public place."

46. The DHRS asserts that malls are "retail stores" and "places of employment" and therefore are "public places" for purposes of the Act, that mall concourses are common areas, and that such common areas are within those where smoking may be prohibited. The DHRS further asserts that in most instances, a mall concourse constitutes the "entryway" to a "public place" (i.e. retail stores) and that the Act prohibits smoking in common areas including such entryways.

47. The Act does not define retail store, place of employment or entryway. There is no definition of what constitutes a mall "concourse."

48. Section 386.205 in part provides as follows:

> (2)(a) A smoking area may not be designated in...any common area as defined in s 386.203....
>
> * * *
>
> (5) A smoking area may not contain common areas which are expected to be used by the public.

49. Section 386.203(6), Florida Statutes, defines common area to be any hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, entryway, or conference room in any public place.

50. Proposed rule 10D-109.009 in part provides as follows:

> (10) If smoking is allowed anywhere in an enclosed shopping mall concourse, then a violation of section 386.205, F.S., exists and shall be documented as :"Smoking permitted or designated in a prohibited area."

51. The evidence fails to establish that the operator of a mall is operating a "retail store." The mall operator sells no merchandise to the public, but merely leases commercial real estate space to retailers.

52. However, mall operators also rent floor space in the interior walkways of the mall to retailers operating from push carts or booths (also known as "open-air" kiosks) within the interior of the mall. Kiosks are retail stores enclosed only by the interior walls of a mall. Renting the interior space of a mall for selling space converts the interior mall space into a place of employment as to the employees of the multiple retailers which operate from kiosks.

53. Additionally, malls employ maintenance and upkeep personnel and additional service personnel as may be warranted. The interior of a mall is a place of employment for such persons.

54. As a place of employment, the interior of a mall is a public place as defined by and for purposes of the Act.

55. As to the question of whether a mall interior is an entryway to retail stores, it is clear that the hallways, corridors, lobbies, and aisles of a mall interior create the only means of access to the large majority of stores within a mall. As such, the interior spaces constitute the entryways to the retail stores within a mall. The Act prohibits smoking in common areas including such entryways.

56. The effect of the statute is to prohibit designation as a smoking area, any part of the common area of a mall.

57. The Petitioners have suggested that the Legislature considered and rejected inclusion of malls within the Acts definition of "public place." The Petitioners have offered no evidence in support of the assertion.

Proposed rule 10D-105.009(11)

58. The Petitioners assert that proposed rule 10D-105.009(11) establishes a violation for allowing smoking in an enclosed shopping mall food court not specifically regulated by the Department of Business and Professional Regulation.

59. The cited rule provides as follows:

> (11) If smoking is allowed in an enclosed shopping mall food court and is not specifically regulated by the Department of Business and Professional Regulation, then a violation of section 386.205, F.S., exists and shall be documented as "Smoking permitted or designated in a prohibited area."

60. Neither the Act nor the proposed rules define what part of a mall constitutes a mall food court. There was no credible evidence offered at hearing to establish what constitutes a mall food court or what characteristics of a mall food court separate and distinguish a food court from a mall concourse. It is not possible, based on the Act, the proposed rule, or the record established at hearing, to determine specifically whether a mall food court is a "common area" within a "public place" so as to provide the DHRS with the authority to adopt the cited rule. Proposed rule 10D-105.009(11) is vague, fails to establish adequate standards for agency decisions, and therefore is an invalid exercise of delegated legislative authority.

Proposed rule 10D-105.011

61. The Petitioners assert that proposed rule 10D-105.011 establishes a test for the award of exemptions from the Act which exceeds the criteria set forth in the Act for such an award.

62. Section 386.207 in part provides as follows:

> (3) A person may request an exemption from ss. 386.205 and 386.206 by applying to the [DHRS]. The [DHRS] may grant exemptions on a case-by-case basis where it determines that substantial good faith efforts have been made to comply or that emergency or extraordinary circumstances exist.

63. The cited rule provides as follows:

> 10D-105.011 - Types of Cases for which Exemptions may be Granted; Procedures by which Appeals may be taken by Aggrieved Parties. --
> (1) The proprietor or other person in charge of a public place may request an exemption from Florida Statutes sections 386.205 or 386.206, by submitting their request in writing to the HRS State Health Officer. On the recommendation of the State Health Officer, the department may grant any exemptions from the requirements of section 386.205(4) or 386.206, F.S., as an emergency or extraordinary circumstances which justifies exemption when compliance with the Florida Clean Indoor Air Act would result in a greater hazard to public health than would result from granting an exemption. Temporary exemptions of limited duration may be granted under emergency or extraordinary conditions when good-faith efforts to comply have been made.

64. The Act clearly states that exemptions may be granted on a case-by-case basis where the DHRS determines that substantial good faith efforts have been made to comply or that emergency or extraordinary circumstances exist. The challenged rule limits such exemptions to those instances where compliance with the Florida Clean Indoor Air Act would result in a greater hazard to public health than would result from granting an exemption. The proposed rule further states that the award of temporary exemptions of limited duration may be granted under emergency or extraordinary conditions when good-faith efforts to comply have been made. The proposed rule enlarges, modifies, or contravenes the specific provisions of law implemented and therefore is an invalid exercise of delegated legislative authority.

Proposed rule 10D-105.012(2)

65. The Petitioner asserts that the schedule of fines set forth in proposed rule 10D-105.012(2) enlarges the authority granted by the Act.

66. Section 386.207, Florida Statutes, addresses the administration and enforcement of the provisions of the Act and provides as follows:

> (1) The [DHRS] shall enforce ss. 386.205 and 386.206 and to implement such enforcement shall adopt...rules specifying procedures to be followed by enforcement personnel in investigating complaints and notifying alleged violators, rules defining types of cases for which exemptions may be granted, and rules specifying procedures by which appeals may be taken by aggrieved parties.
> (2) Public agencies responsible for the management and maintenance of government

> buildings shall report observed violations to the department or the division. The State Fire Marshal shall report to the department or division observed violations of ss. 386.205 and 386.206 found during its periodic inspections conducted pursuant to its regulatory authority. The department or division, upon notification of observed violations of ss. 386.205 and 386.206 , shall issue to the proprietor or other person in charge of such public place a notice to comply with ss. 386.205 and 386.206. If such person fails to comply within 30 days after receipt of such notice, the department or division shall assess a civil penalty against him not to exceed $100 for the first violation and not to exceed $500 for each subsequent violation. The imposition of such fine shall be in accordance with the provisions of chapter 120. If a person refuses to comply with ss. 386.205 and 386.206, after having been assessed such penalty, the department or division may file a complaint in the circuit court of the county in which such public place is located to require compliance.

67. Proposed rule 10D-105.012(2) establishes a schedule of fines applicable to violations of the Act and provides as follows:

> (1) When the proprietor or other person in charge of a public place has been notified of observed violations and has failed to correct those violations, the department shall assess fines in accordance with the provisions of Chapter 120, Florida Statutes....
> (The subsection includes a list of violations with increasing fines depending on whether the violation is a first, second or third offense.)
>
> * * *
>
> (2) For every offense after the third offense, the maximum penalty of $500.00 shall be assessed. Each day that a violation continues shall constitute a separate violation. Separate fines shall be assessed for each observed violation, and for each day that each violation persists.

68. The statute being implemented is not clear as to the manner in which the number of offenses should be counted. However, it does not provide that each day a violation continues shall constitute a separate violation. Such interpretation is contrary to the provision of a 30 day period after receipt of such notice during which a alleged offender may attempt to comply. It is not until the 30 day period has elapsed, that the DHRS may assess civil penalties. If, after the assessment of such a penalty, the alleged offender remains non-compliant, the DHRS may proceed to file a complaint in the circuit court of the

county in which such public place is located to require compliance. The cited subsection of the rule enlarges, modifies, or contravenes the specific provisions of law implemented and is an invalid exercise of delegated legislative authority.

FINAL ORDER

Based upon the foregoing findings of fact and conclusions of law, it is determined that the proposed rules 10D-105.009(4), 10D-105.009(8), 10D-105.009(11), 10D-105.011, and 10D-105.012(2) constitute an invalid exercise of delegated legislative authority and that proposed rules 10D-105.009(1), 10D-105.009(2) and 10D-105.009(3) do not constitute an invalid exercise of delegated legislative authority.

DONE and ENTERED this 1st day of December, 1993, in Tallahassee, Florida.

_____

WILLIAM F. QUATTLEBAUM
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of December, 1993.

APPENDIX TO FINAL ORDER, CASE NO. 93-4846RP

To comply with the requirements of Section 120.59(2), Florida Statutes, the following constitute rulings on proposed findings of facts submitted by the parties.

Petitioner

The Petitioner's proposed findings of fact are accepted as modified and incorporated in the Final Order except as follows:

5-12. Rejected, not supported by the greater weight of credible and persuasive evidence. The evidence fails to establish that sales declines are attributable to mall smoking restrictions as opposed to other factors affecting sales.

13. Rejected, speculative, not supported by the greater weight of credible and persuasive evidence.

14. Rejected, unnecessary.

17-20. Rejected, cumulative.

21. Rejected, speculative, not supported by the greater weight of credible and persuasive evidence.

22. Rejected, speculative, customer traffic decline is not supported by the greater weight of credible and persuasive evidence.

23. Rejected, immaterial.

24. Rejected, lack of adverse impact related to smoking decline is speculative, not supported by the greater weight of credible and persuasive evidence.
25-27. Rejected, immaterial.
28. Rejected, unnecessary.

Respondent

The Respondent's proposed findings of fact are accepted as modified and incorporated in the Final Order except as follows:

2, 8. Rejected, unnecessary, goes to weight of evidence.
11. Rejected, cumulative
19. Rejected, unnecessary, goes to weight of evidence.
21. Rejected as to "collection of retail stores", immaterial. The Act does not address "collection of retail stores."
24-25. Rejected, irrelevant

Intervenor American Cancer Society

Intervenor American Cancer Society's proposed findings of fact are accepted as modified and incorporated in the Final Order except as follows:

1-5. Rejected, unnecessary.
6-7. Rejected, unnecessary, goes to the weight of evidence.

Intervenor American Lung Association

Intervenor American Lung Association adopted the proposed findings of fact submitted by the Department of Health and Rehabilitative Services and the American Cancer Society which are addressed herein.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the Order to be reviewed.

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DISTRICT COURT OPINION

==========

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GARRISON CORPORATION, INC., D/B/A SMOKE & SNUFF and MACKOUL DISTRIBUTORS, INC.,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

Appellants/Cross-Appellees,

V.

CASE NO. 93-4235
DOAH CASE NO. 93-4846RP

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AMERICAN CANCER SOCIETY and AMERICAN LUNG ASSOCIATION,

Appellees/Cross-Appellants.
_____/

Opinion filed November 27, 1995.

An appeal from an order of the Division of Administrative Hearings.

John French and Robert S. Cohen of Pennington & Haben, Tallahassee, for appellants/cross-appellees.

William A. Frieder, Assistant General Counsel, Department of Health and Rehabilitative Services, Tallahassee, for appellees/cross- appellants.

WENTWORTH, Senior Judge.

This is an appeal from a final order of the Division of Administrative Hearings, reviewing the validity of proposed rules related to Part II of Chapter 386, Florida Statutes, the Florida Clean Indoor Air Act (the Act). After a formal hearing on the merits pursuant to section 120.54(4), Florida Statutes, the hearing officer held that the Appellant Garrison was without standing to challenge the proposed rules. Citing a prehearing stipulation of the parties that the Appellant Mackoul operated a "place of employment," the hearing officer found Mackoul, as such, to be subject to the Act and accorded standing to Mackoul on that basis. The appellants challenge (1) the denial of standing to Garrison and (2) the hearing officer's conclusion that proposed rules 10D-105.009(1), (2), and (3) constitute a valid exercise of delegated legislative authority. The Department of Health and Rehabilitative Services (HRS) has cross-appealed, challenging (1) Mackoul's standing to contest proposed rules related to shopping malls and (2) the invalidation of proposed rules 10D-105.009(4), 10D-105.009(8), 10D-105.009(11), 10D-105.011, and 10D-105.012(2). We affirm the order in all respects except its conclusion that proposed rule 10D-105.009(11) is an invalid exercise of delegated legislative authority.

Garrison operates a chain of retail tobacco stores located in 16 Florida shopping malls. The Act expressly excludes those retail stores which have as their primary business the sale of tobacco or tobacco related products. Section 386.203(1)(q), Florida Statutes (1993). Garrison is not subject to the Act and cannot, therefore, allege that the proposed rule will cause an injury in fact or assert an interest protected by the act. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA) rev. denied, 415 So.2d 1359 (Fla.1982); Bd. of Optometry v. Society of Opthamology, 538 So.2d 878 (Fla. 1st DCA 1988). The parties stipulated that Mackoul operates a place of employment. In light of that stipulation, we conclude that HRS has waived objection to Mackoul's standing, and we therefore reject its challenge to Mackoul's standing as a place of employment. All of the proposed rules impact places of employment. On the basis of the parties' stipulation, the Appellant Mackoul has standing to challenge all of the proposed rules.

The hearing officer concluded that proposed rule 10D-105.009, subsections (1), (2), and (3), 1/ did not contravene section 386.205(3), Florida Statutes, which deems compliance on the part of those employers that make reasonable efforts to develop, implement, and post a smoking policy. As the hearing officer observed, the proposed rules provide nothing more than the procedure to be followed by enforcement personnel in investigating complaints and notifying alleged violators of the Act. Section 386.205(3), Florida Statutes, requires employers subject to the Act to develop, implement, and post a policy regarding the designation of smoking and nonsmoking areas. That statute further provides that employers failing to develop, implement, or post a smoking policy, but making reasonable efforts to comply, shall be deemed in compliance The cited subsections of the proposed. rule do not foreclose the statutory mandate, which remains effective to deem compliance on the part of an employer that has failed but has made reasonable efforts to develop, implement, or post such a policy.

The hearing officer invalidated proposed rule 10D-105.009(4) 2/ as illogical and arbitrary. The proposed rule simply states that before a common area may be designated a smoking area, all workers assigned to work within that single closed area must agree to that designation. The rule, however, classifies violations for failing to post signs in a designated smoking area and failing to implement a policy regarding smoking and nonsmoking areas. Failure to obtain approval of all workers in a common area before designating the area a smoking area constitutes neither a failure to implement a smoking policy nor failure to post signs in a designated smoking area. The proposed rule is thus not reasonably related to the appropriate purpose of the statute. Moreover, failure to obtain approval of all workers in a common area before designating the area a smoking area is addressed by proposed rule 10D-105.009(5). 3/ Proposed rule 10D-105.009(4) is therefore duplicative and fails to establish adequate standards to guide the agency's application of the two rules in notifying alleged offenders of the violation.

Proposed rule 10D-105.009(8) 4/ enlarges the specific provisions of the law implemented and thereby constitutes an invalid exercise of delegated legislative authority. Section 386.205(4) of the Act limits the designation of a smoking area to no more than one-half of the total square footage in any public place within a single enclosed area used for a common purpose. Section 386.205(3) of the Act exempts from calculation of that square footage "private office work space which is not a common area as defined in s. 386.203(6) 5/ and which is ordinarily inaccessible to the public." The proposed rule establishes a violation "[i]f single occupancy offices have not been counted in the calculation of the square footage of a designated smoking area where both

smokers and nonsmokers routinely assigned to work at the same time and the doors of those offices are left open." Leaving the doors of private office space open makes of that space neither a common area as defined by s 386.203(6) nor necessarily more accessible to the public. The proposed rule thus enlarges the specific provisions of the implemented statute and is, therefore, an invalid exercise of delegated legislative authority.

Proposed rule 10D-109.009(10) 6/ which prohibits smoking or designation of a smoking area in a shopping mall concourse, does not enlarge the provisions of the statute. Although the Act does not include shopping malls among its definitions of "public places" subject to the act, it does include places of employment. Section 386.203(s), Florida Statutes (1993). The management of shopping malls employs maintenance and additional service personnel. For such personnel, the shopping mall is a place of employment. As a place of employment, the interior of the shopping mall is a "public place" as defined by the Act. Shopping malls are, therefore, subject to the Act, as the hearing officer correctly found. Because Mackoul has standing as a place of employment on the basis of the parties' stipulation, it could properly challenge this proposed rule.

Similarly, proposed rule 10D-105.009(11) 7/ does not exceed the agency's statutory authority and is reasonably related to the appropriate purpose of the statute. The proposed rule prohibits smoking or designation of a smoking area in a shopping mall food court. Although the Act does not specifically define shopping mall food court, the hearing officer reasonably distinguishes the food court from the mall concourse. A shopping mall food court need not, as the hearing officer reasoned, be a "common area" within a "public place" before HRS may apply the Act through the proposed rule. As is the interior 9f the shopping mall concourse., so the shopping mall food court is a place of employment. As such, it is subject to the Act.

We agree with the hearing officer's conclusion that proposed rule 10D-105.011 8/ enlarges the specific provisions of the law implemented. Section 386.207 of the Act allows parties subject to the Act to request an exemption from s 386.205 and 386.206 by application to the agency. The agency may grant exemptions "on a case-by-case basis where it determines that substantial good faith efforts have been made to comply or that emergency or extraordinary circumstances exist." Section 386.207(3) Florida Statutes (1993)

The proposed rule provides that exemptions are justified as an emergency or extraordinary circumstance when compliance with the Act would result in greater hazard-to public health than would result from granting an exemption. Additionally, the rule provides for temporary exemptions of limited duration under emergency or extraordinary conditions when good faith efforts to comply have been made. The rule appears to describe two general circumstances in which exemptions would be granted: one that has no statutory basis and another that combines the two independent bases of the statute. The implemented statute requires merely substantial good faith effort to comply. The rule requires that compliance result in greater hazard to public health than noncompliance.

Additionally, the statute requires merely the existence of

> and 386.206, F.S., as an emergency or extraordinary circumstance which justifies exemption when compliance with the Florida Clean Indoor Air Act would result in a greater hazard to public health than would result from granting the exemption. Temporary exemptions of limited duration may be granted under emergency or extraordinary conditions when good-faith efforts to comply have been made.

emergency or extraordinary circumstances. The rule adds to those circumstances an additional requirement of a good faith effort to comply. The hearing officer did not err in finding the rule to enlarge, modify or contravene the specific provisions of the law implemented.

Proposed rule 10D-105.012(2) 9/ is also an invalid exercise of delegated legislative authority. Section 386.297 of the Act provides for enforcement procedures in cases of alleged violations of s 386.205 and 386.206. The statute requires the agency to issue to the person in charge of the subject public place a notice to comply. The statute further states that if the person fails to comply within 30 days after receipt of that notice, the agency will assess fines "not to exceed $100 for the first violation and $500 for each subsequent violation." Proposed rule 10D-105.012(2) does not address the statute's 30 day requirement. The statute clearly provides an alleged offender 30 days, beginning when notified of the violation, in which to comply before the agency may impose civil penalties. The literal terms of the rule effectively deny an alleged offender the statutory 30 day period in which to comply, substituting in its place separate violations for each day of noncompliance. The rule thus contravenes the implemented statute as the hearing officer found.

Finally, the hearing officer found as a matter of fact that the evidence failed to establish that any decline in sales was "directly or primarily" related to the smoking restrictions imposed in malls where its stores are located. The parties concede and we agree that "direct and primary" is an improper statement of the standard that the hearing officer, in fact, applied. The hearing officer correctly stated the standard in his conclusions of law, in which he concluded that Garrison failed to establish that any decline in sales or customer traffic is "directly or proximately" the result of smoking restrictions imposed in the subject malls. We find competent and substantial evidence in the record to support that conclusion.

The order is accordingly affirmed in part and reversed in part, and the cause is remanded for disposition in accordance herewith.

ZEHMER, C.J., and DAVIS, J., CONCUR.

ENDNOTES

1/ Proposed rule 10D-105.009 reads in pertinent part:

> (1) In any workplace where there are smokers and nonsmokers, employers shall develop a policy with regard to the designation of

smoking areas. Should there be no written policy, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to develop a smoking policy regarding smoking and nonsmoking areas." (2) Employers are required to implement a written smoking policy. If employees are observed violating a workplace smoking policy, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to implement an existing policy." (3) Should a smoking policy exist for a workplace but not be posted, a violation of section 386.205(3), F.S., exists and will be documented as "Failure to post a smoking policy."

2/ Proposed rule 10D-105.009(4) reads:
(4) When a common work area is designated as a smoking area, all workers assigned to work within that single enclosed area must agree to such designation. (Partitioned work spaces and rooms not separated by closed doors, lour to ceiling moveable walls or similar floor to ceiling barrier do not constitute separate work areas.) This violation of the Florida Clean Indoor Air Act will be documented as:
(a) failure to post signs in a designated smoking area, a violation of section 386.206, F.S., and
(b) failure to implement a smoking policy regarding smoking and nonsmoking areas, a violation of section 386.205(3), F.S.

3/ Proposed rule 10D-105.009(5) reads:
If one or more workers assigned to a common work area does not consent to smoking being permitted in that common work area, then that area can not be designated as a smoking area. If a smoking area is designated in a common work area over the objections of any worker assigned to work in that area, then a violation of section 386.205(3), F.S., exists and will be documented as: "Common work area designated as smoking area without employee consent."

4/ Proposed rule 10D-105.009(8) reads:
If single-occupancy offices have not been counted in the calculation of the square footage of a designated smoking area where both smokers and nonsmokers routinely assigned to work at Th se time and the doors of those offices are left open, then a

violation of section 386.205(3), exists and will be documented as: "Square footage calculation for designation of smoking areas is incorrect."

5/ Sec. 386.203(6) reads:
"Common area" means any hallway, corridor, lobby, aisle, water fountain area, restroom, stairwell, entryway, or conference room in any public place.

6/ Proposed rule 10D-105.009(10) reads:
If smoking is allowed anywhere in an enclosed shopping mall concourse, then a violation of section 386.205, F.S., exists and shall be documented as: "Smoking permitted or - designated in a prohibited area."

7/ Proposed rule 10D-105.009(11) reads:
If smoking is allowed in an enclosed shopping mall food court and is not specifically regulated by the Department of Business and Professional Regulation, then a violation of section 386.205, F.S., exists and shall be documented as: "Smoking permitted or designated in a prohibited area."

8/ Proposed rule 10D-105.011 reads in pertinent part:
(1) The proprietor or other person in charge of a public place may request an exemption from Florida Statutes sections 386.205 or 386.206, by submitting their requests in writing to the HRS State Health Officer. On the recommendation of the State Health Officer, the department may grant exemptions from the requirements of section 386.205(4)

9/ Proposed rule 10D-105.012(2) reads:
For every offense after the third offense, the maximum penalty of $500.00 shall be assessed. Each day that a violation continues shall constitute a separate violation. Separate fines shall be assessed for each observed violation, and for each day that each violation persists. (Emphasis added.)

M A N D A T E
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, William F. Quattlebaum, Hearing Officer
Division of Administrative Hearings

WHEREAS, in that certain cause filed in this Court styled:

GARRISON CORPORATION, INC.
d/b/a SMOKE & SNUFF
MACKOUL DISTRIBUTORS', INC.,
and ELAINE TOLAR

vs.

Case No. 93-4235
Your Case No. 93-4846RP

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
AMERICAN CANCER SOCIETY, FLORIDA
DIVISION, INC., and AMERICAN LUNG
ASSOCIATION OF FLORIDA, INC.
_____/

The attached opinion was rendered on November 27, 1995

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable E, Earle Zehmer

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 13th day of December, 1995

_____
Jon S. Wheeler
Clerk, District Court of Appeal of Florida,
First District

MANDATE
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable William F. Quattlebaum, Hearing Officer

WHEREAS, in that certain cause filed in this Court styled:

GARRISON CORPORATION, INC.
d/b/a SMOKE & SNUFF
MACKOUL DISTRIBUTORS', INC.,
and ELAINE TOLAR

vs.

Case No. 93-4235
Your Case No. 93-4846RP

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES and
AMERICAN CANCER SOCIETY, FLORIDA
DIVISION, INC., and AMERICAN LUNG
ASSOCIATION OF FLORIDA, INC.
Division of Administrative Hearings

The attached opinion was rendered on November 27, 1995,.

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WITNESS the Honorable E. Earle Zehmer

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 13th day of December, 1995.

_____
Clerk, District Court of Appeal of Florida,
First District